POH AH CHOO

v.

TAN SIEW GIM & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[SUIT NO. 295 OF 1984]
12 APRIL 1985

CIVIL PROCEDURE: *Interlocutory Injunction - Application for discharge - Failure to explain delay in institution of suit - Whether such failure constituted non-disclosure of a material fact.*

The application was by the defendants for the discharge of an *ex parte* interlocutory injunction granted to the plaintiff and arising out of a suit by the plaintiff who claimed that as the lawful secondary wife of the deceased, Ooi Guan Lee, she was entitled to a share in his estate. The deceased died intestate on 26 March 1963 and letters of administration in respect of his estate were extracted on 4 September 1964 in favour of the 1st defendant, who was the first wife of the deceased, and the 2nd defendant, one of the children of the first marriage. The plaintiff's suit was instituted on 4 July 1984.

Held:

[1] The *ex parte* order would have to be set aside irrespective of the merits. There was a non-disclosure of material facts in that the plaintiff had omitted to explain, at the *ex parte* stage, the lapse of nearly twenty years on her part in the institution of the suit. The essence of an application for an interlocutory injunction is that it should be made promptly. *(Thomas A. Edison Ltd. v. Bullock* [1912] 15 CLR 679; *Sherwell v. Combined Incandescent Mentles Syndicate Ltd.* [1907] WN 211, 212; *Castelli v. Cook* [1849] 7 Hare 89 Eng. Rpts. Vol. 68 p. 36; *Dalglish v. Jarvis* [1850] 2 Mac. & G. 231 (*Macnaghten & Gordon's Reports* Vol. 2)]

[2] The plaintiff could, however, make an application *de novo* for an interlocutory injunction, the proceedings to take place on notice. (*Thomas A. Edison Ltd. v. Bullock* (*supra*)).

[Application allowed]

Cases referred to:

Thomas A. Edison Ltd. v. Bullock [1912] 15 CLR 679
Sherwell v. Combined Incandescent Mentles Syndicate Ltd. [1907] WN 211
A.G. v. Liverpool Corporation [1835] 42 ER 342
Rex v. Kensington Income Tax Commissioners [1917] KB 486
Re A debtor (No. 75N of 1982 Warrington), ex parte the debtor v. National Westminster Bank plc and Anor. (appeal) [1983] 3 All ER 545
Castelli v. Cook [1849] 7 Hare 89 ER Vol 68 36
Dalglish v. Jarvis [1850] 2 Mac & G 231

For the plaintiff - Balasundaram; M/s Shamsuriah & Balasundaram
For the defendants - David Choong; M/s Lim, Lim & Onn

JUDGMENT

Edgar Joseph Jr J:

This was a defendant's application for discharge of an *ex parte* interlocutory injunction ("the *Ex Parte* Order") granted by me and arises out of a suit by the plaintiff who claims that as the lawful Secondary Wife of one Ooi Guan Lee ("the deceased") who died intestate on 26 February 1963 she is entitled to a share in his estate.

The first defendant is the lawful wife of the deceased. The second, third, fourth, fifth and sixth defendants are the lawful children of that marriage.

The *Ex Parte* Order restrained the defendants whether jointly or severally from in any manner selling, charging, leasing or otherwise howsoever dealing with certain lands and hereditaments specified therein and which form part of the Estate of the deceased.

Although Letters of Administration in respect of the Estate of the deceased were extracted as long ago as 4 September 1964 in favour of the first and second defendants, it was not until 4 July 1984 that the suit herein was instituted so that, on the face of it, the claim therein was in the nature of a very stale demand; yet, when applying for the *Ex Parte* Order, no attempt was made by the plaintiff to explain what was apparently an inordinate delay.

Not unexpectedly, therefore, at the *inter partes* stage, Counsel for the defendants, when moving for the discharge of the *Ex Parte* Order, stressed the want of promptitude on the part of the plaintiff in instituting the Suit and seeking the *Ex Parte* Order.

What, however, I considered was more to the point, was whether, at the time when she sought the *Ex Parte* Order, the plaintiff had brought forward all material facts which the defendants might presumably have brought forward in their defence to the application had they been present. As was said by Isaacs J in *Thomas A. Edison Ltd. v. Bullock* [1912] 15 CLR 679 at p. 682:

> *Uberrima fides* is required, and the party inducing the Court to act in the absence of the other party fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fail.

Accordingly, the plaintiff who was represented, could reasonably have anticipated that had her application been made *inter partes* the defendants would have raised an objection founded on delay since the essence of an application for an interlocutory injunction is that "it should be made with promptness" - *Sherwell v. Combined Incandescent Mentles Syndicate Ltd.* [1907] WN 211, 212. It follows, an explanation for the long delay should have been, but was not, offered right from the start, that is to say, at the *ex parte* stage. The omission was, to my mind, most material.

I say so, because, the question whether the fact omitted is material does not depend on establishing that the undisclosed matters in question would, if disclosed, have been decisive against the party who has not made proper disclosure. It is enough to show that it is relevant and might forseeably have been regarded by the Court as of weight; so for example, there is authority for saying that the test is to ask whether there has been any "misstatement or omission of any important facts": *A.G. v. Liverpool Corporation* [1835] 42 ER 342, 356; *Rex v. Kensington Income Tax Commissioners* [1917] 1 KB 486, 504.

The fact that at the *inter partes* stage the plaintiff was overflowing with candour and offered a lengthy explanation in her affidavit in opposition to the application now before me does not in the circumstances assist her. It is therefore, unnecessary for me to consider those explanations, the gist of which was that she was the victim of a concealed fraud practised upon her by the first and second defendants so that she first became aware that her rights were being infringed only as recently as September, 1983.

I might add that in arriving at the above conclusion I have not overlooked the extent of the duty of an applicant applying *ex parte* as explained by Warner J in *Re A debtor (No. 75N of 1982, Warrington), ex parte the debtor v. National Westminster Bank plc and Anor. (appeal)* [1983] 3 All ER 545 at p. 551 d. In that case His Lordship described it thus:

> The rule in *Ex p Princess de Polignac* exists because, by definition, on an *ex parte* application the person against whom the order is sought is absent. It is accordingly the duty of the applicant to inform the Court of any facts which he knows which might tell in that person's favour. But the applicant is under no obligation to place before the Court every fact that might reinforce his own case.

Accordingly, I am satisfied that there was here a non-disclosure of material facts in that the plaintiff had omitted to explain, at the *ex parte* stage, the lapse of nearly twenty years on her part in the institution of the suit.

The *Ex Parte* Order will therefore have to set aside irrespective of the merits: *Castelli v. Cook* [1849] 7 Hare 89 ER Vol 68 36 and *Dalglish v. Jarvis* [1850] 2 Mac & G 231 (*Macnaghten & Gordon's Reports* Vol. 2).

The plaintiff, however, does not become anathema for all purposes. She may, if she wishes, make application *de novo* for an interlocutory injunction (see *Thomas A. Edison Ltd. v. Bullock, supra*); but, on any further application, proceedings should take place on notice, rather than *ex parte*, and, if so, full and fair disclosure must be made. The application will then be considered on its merits.

In the result, I allow the application for discharge of the *Ex Parte* Order with costs.

Also found at [1985] 1 CLJ 463